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HEAP, INC.

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

15 JAMES CONRAD,

16 Plaintiff,

17 vs.

18 ALLSTATE INSURANCE COMPANY, ET AL., ,

19 Defendants.

Case No. 4:23-cv-01931-JSC

Hon. Jacqueline S. Corley

**DEFENDANT HEAP INC.'S NOTICE OF  
MOTION AND MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT**

Date: August 10, 2023

Time: 10:00 a.m.

Ctrm: 8

Trial Date: None Set

1 **NOTICE OF MOTION TO DISMISS**

2 PLEASE TAKE NOTICE that on August 10, 2023, at 10:00 a.m., or as soon thereafter as the  
3 matter may be heard in Courtroom 8 (19<sup>th</sup> Floor) of the above-entitled court, located 450 Golden  
4 Gate Avenue, San Francisco, California, 94102, Defendant Heap Inc. ("Heap") will, and hereby  
5 does, move the Court under Federal Rule of Civil Procedure rule 12(b)(6) for an Order dismissing,  
6 in whole or in part, the Complaint by Plaintiff James Conrad, individually and on behalf of all others  
7 similarly situated ("Plaintiff").

8 **STATEMENT OF RELIEF SOUGHT (L.R. 7-2(B)(3))**

9 Defendant Heap Inc. seeks an Order pursuant to Rule 12(b)(6) dismissing the Complaint,  
10 in whole or in part, for failure to state a claim upon which relief can be granted.

11 This motion is based on this notice, the memorandum of points and authorities submitted  
12 herewith, and all other facts the Court may or should take notice of, all files, records, and  
13 proceedings in this case, and any oral argument the Court may entertain.

14  
15 DATED: May 31, 2023

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ELEONORA ANTONYAN  
MICHAEL K. JOHNSON  
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16  
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19 By: 

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff James Conrad brings claims against software-as-a-service provider Defendant  
4 Heap Inc. (“Heap”) for providing a commonplace internet analytics tool to Defendant Allstate  
5 Insurance Company (“Allstate”) to help Allstate capture the actions taken by users interacting with  
6 its own website. In short, this case is about Allstate’s ability to understand how its website is  
7 functioning and how users are interacting with its website to ensure a smooth, error-free  
8 experience for the website users. Plaintiff’s argument that such routine internet functionality  
9 amounts to unlawful wiretapping and eavesdropping are meritless. Stripped of conclusory legal  
10 assertions and hyperbole, the Complaint’s factual allegations do not support Plaintiff’s claims. As  
11 such, the Court should dismiss the Complaint with prejudice for the reasons described below.

12 *First*, Plaintiff’s California Invasion of Privacy Act (“CIPA”) claim fails for multiple  
13 reasons. Plaintiff cannot bring a claim under Section 631(a)(i) as it exclusively pertains to  
14 wiretapping of “telegraph or telephone wire, line, cable, or instrument.” Further, Heap fits within  
15 the well-recognized party-participant exception under Section 631. Because Heap was not a third-  
16 party to the alleged communication, but an extension of Allstate, Heap cannot be held liable for  
17 eavesdropping under Section 631. Finally, the alleged information at issue does not constitute  
18 “content” for purposes of CIPA.

19 *Second*, Plaintiff has failed to state a claim for invasion of privacy under the California  
20 Constitution. Plaintiff cannot plausibly allege that he held a reasonable expectation of privacy in  
21 the information allegedly collected because Plaintiff intentionally shared that information over the  
22 internet with Allstate. Nor has Plaintiff adequately alleged that the data collection at issues  
23 constitutes an “egregious breach of social norms.” As a matter of law, such routine collection of  
24 data for analytics purposes cannot rise to the requisite level for invasion of privacy.

25 *Third*, Plaintiff’s claims for violation of California’s Unfair Competition Law (“UCL”)  
26 fail. Plaintiff does not have standing to assert UCL violations as he does not and cannot plead any  
27 actual injury in the form of lost money or property. Moreover, Plaintiff’s UCL claims are based on  
28 Heap’s alleged violation of CIPA. Because Plaintiff’s underlying CIPA claim fails, so does his

claim for violation of UCL.

Plaintiff's Complaint should be dismissed in its entirety.

**II. STATEMENT OF THE ISSUES TO BE DECIDED**

- Whether Section 631(a)(i) applies to internet communications.
- Whether the information at issue is considered "content" under Section 631(a)(ii) and (a)(iv).
- Whether Heap is a party-participant for purposes of CIPA.
- Whether Heap aided and abetted Allstate to "eavesdrop" on Plaintiff's communications.
- Whether Plaintiff has standing to bring UCL claims.
- Whether Plaintiff plead sufficient facts to constitute unlawful and unfair conduct under UCL.
- Whether the information at issue is considered "sensitive and confidential" for purposes of Plaintiff's Constitutional Invasion of Privacy claim.
- Whether Heap's alleged invasion of Plaintiff's privacy is sufficiently serious for purposes of Plaintiff's Constitutional Invasion of Privacy claim.
- Whether Heap's services or its alleged intrusion onto Plaintiff's privacy is highly offensive for purposes of Plaintiff's Constitutional Invasion of Privacy claim.

**III. FACTUAL ALLEGATIONS**

Plaintiff alleges "Allstate owns and operates Allstate.com." Compl. ¶ 17. "Heap Inc. ('Heap') is a marketing analytic software-as-a-service ("SaaS") company that sells an analytics platform software product that records consumer interactions with a website in real time. Website owners can use this software by adding Heap's JavaScript into the source code of their website. This allows both Heap and the website owner to record a visitor's keystrokes and other actions on the website." *Id.* at ¶ 2. Plaintiff asserts "Allstate uses Heap's JavaScript on Allstate.com, which is embedded in the source code of Allstate's website." *Id.* at ¶ 30.

Plaintiff alleges he entered his information into an online form on Allstate's website to get an insurance quote. *Id.* at ¶ 6. Plaintiff asserts during his visit, "Allstate and Heap recorded Plaintiff's electronic communications in real time, and used the intercepted data to learn his identity, email address, zip code, date of birth, height, weight, use of prescription medications and tobacco products, and other PII and PHI without his consent." *Id.* Plaintiff asserts "[d]uring

1 Plaintiff's visit, Heap's 'Session Replay' feature created a video capturing Plaintiff's keystrokes  
2 and mouse clicks on the website. It also captured the date and time of each visit, the duration of  
3 the visit, Plaintiff's IP address, his location at the time of the visit, browser type, and the operating  
4 system on their device." *Id.* at ¶ 50.

5 Plaintiff baldly alleges Defendants "intercepted" his communications without providing  
6 any factual information as to when and how the alleged interception occurred. *See, e.g., id.*, ¶¶ 6-7,  
7 41. Plaintiff is also unclear as to which Defendant allegedly captured his information. *Compare* ¶  
8 43 ("Allstate knows it captures keystrokes, mouse clicks and other communications of visitors to  
9 its website, and Allstate supplies that information to Heap.") and ¶ 42 ("Allstate failed to give  
10 Plaintiff and members of the putative class adequate notice that their form responses have been  
11 intercepted and transmitted to Heap and that their activity will continue to be intercepted and  
12 transmitted to Heap if they continue to answer additional questions."); *with* ¶ 22 ("As soon as the  
13 JavaScript is added to a webpage, Heap will automatically start to capture the data submitted in  
14 the form.") Plaintiff does not allege any misuse or dissemination of the allegedly captured  
15 information by Heap.

#### 16 **IV. LEGAL STANDARD**

17 A court must dismiss a complaint under Rule 12(b)(6) if the alleged facts do not "state a  
18 claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
19 A claim is facially plausible when the plaintiff pleads facts that "allow[ ] the court to draw the  
20 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556  
21 U.S. 662, 678 (2009) (internal citations and quotations omitted). There must be "more than a sheer  
22 possibility that a defendant has acted unlawfully." *Id.* A complaint fails to state a claim if the relief  
23 it seeks is barred as a matter of law. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

24 In ruling on a motion to dismiss, the court accepts the plaintiff's allegations as true and  
25 draws all reasonable inferences in its favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th  
26 Cir. 1987). The court is not required to accept as true "allegations that are merely conclusory,  
27 unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*,  
28 266 F.3d 979, 988 (9th Cir. 2001). "[T]he tenet that a court must accept as true all of the

1 allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678  
2 (2009). Legal conclusions “must be supported by factual allegations.” *Id.* at 679.

3 **V. ARGUMENT**

4 **A. PLAINTIFF’S CALIFORNIA INVASION OF PRIVACY ACT CLAIMS FAIL**

5 The CIPA, Cal. Penal Code § 631, provides:

6 (a) Any person who, by means of any machine, instrument, or contrivance, or in any other  
7 manner,

8 [i] intentionally taps, or makes any unauthorized connection, whether physically,  
9 electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire,  
10 line, cable, or instrument, including the wire, line, cable, or instrument of any internal  
11 telephonic communication system, or

12 [ii] who willfully and without the consent of all parties to the communication, or in any  
13 unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any  
14 message, report, or communication while the same is in transit or passing over any wire,  
15 line, or cable, or is being sent from, or received at any place within this state; or

16 [iii] who uses, or attempts to use, in any manner, or for any purpose, or to communicate in  
17 any way, any information so obtained, or

18 [iv] who aids, agrees with, employs, or conspires with any person or persons to unlawfully  
19 do, or permit, or cause to be done any of the acts or things mentioned above in this section,  
20 is punishable by a fine ....

21 Cal. Penal Code § 631(a) (line breaks and subdivisions added for ease of reference). The  
22 California Supreme Court has distilled this down to “three distinct and mutually independent  
23 patterns of conduct: intentional wiretapping, willfully attempting to learn the contents or meaning  
24 of a communication in transit over a wire, and attempting to use or communicate information  
25 obtained as a result of engaging in either of the previous two activities.” *Tavernetti v. Superior  
26 Court of San Diego Cty.*, 22 Cal. 3d 187, 192 (Cal. 1978).

27 Plaintiff alleges Allstate violated the first and fourth, and Heap violated the first, second,  
28 and fourth clauses of Section 631(a). Comp. ¶¶ 75(a-b) -76(a-c).

Plaintiff’s claims should be dismissed because Plaintiff has not and cannot plead that Heap  
has violated CIPA as a matter of law.

///

1                                   **1.       Allstate and Heap Cannot Be Liable Under Section 631(a)(i) as This**  
2                                   **Section Pertains Exclusively to Telephone Wiretapping Conduct**

3           As courts in this district consistently recognized, Section 631(a)(i) concerns telephonic  
4 wiretapping specifically and does not apply in the context of internet communications. *In re*  
5 *Google Assistant Privacy Litig.*, 457 F. Supp. 3d 797, 825 (N.D. Cal. 2020) (Judge Beth Labson  
6 Freeman) (explaining that “the plain text of the statute . . . expressly requires that the unauthorized  
7 ‘connection’ be made with ‘any telegraph or telephone wire, line, cable, or instrument’”  
8 (quoting Cal. Penal Code § 631(a))); *In re Google Inc. Gmail Litig.*, 2013 U.S. Dist. LEXIS  
9 172784, 2013 WL 5423918, at \*20 (N.D. Cal. Sept. 26, 2013) (Judge Lucy H. Koh) (describing  
10 the “limitation of ‘telegraphic or telephone’ on ‘wire, line, cable, or instrument’ in the first clause  
11 of [Section 631(a)]”).

12           Indeed, courts have applied Section 631(a) via the language of its second clause to the  
13 internet browsing context. *See, e.g., In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d at  
14 826 (analyzing whether communication was sent from or received in California); *Silver v. Stripe*  
15 *Inc.*, 2021 U.S. Dist. LEXIS 141090, 2021 WL 3191752, at \*3-4 (N.D. Cal. July 28, 2021)  
16 (analyzing whether alleged eavesdropping was consented to); *Adler v. Community.com, Inc.*, 2021  
17 U.S. Dist. LEXIS 201644, 2021 WL 4805435, at \*3-4 (C.D. Cal. Aug. 2, 2021) (analyzing  
18 whether communication was intercepted in transit). Plaintiff does not allege any interception of  
19 “telegraph or telephone wire, line, cable, or instrument.” Plaintiff thus fails to state a claim against  
20 both Allstate and Heap under the first clause of Section 631(a).

21                                   **2.       Heap, as an Extension of Allstate, Is a Party-Participant to the**  
22                                   **Communication and Cannot “Eavesdrop” to Such Communications as a**  
23                                   **Matter of Law**

24           Section 631(a) applies to third parties and not participants to the communication. *Powell v.*  
25 *Union Pac. R. Co.*, 864 F. Supp. 2d 949, 955 (E.D. Cal. 2012) (collecting cases). Only a third  
26 party can listen to a conversation secretly. *Williams v. What If Holdings, LLC*, No. 22-03780-  
27 WHA, 2022 WL 17869275, at \*2 (N.D. Cal. Dec. 22, 2022) (“Parties to a conversation cannot  
28 eavesdrop on their own conversation.”); *Licea v. Cinmar, LLC*, No. 22-6454-MWF, 2023 WL  
2415592, at \*7 (C.D. Cal. Mar. 7, 2023) (hereinafter “*Cinmar*”) (“Section 631 contains an

1 exemption from liability for a person who was a ‘party’ to a communication.”) (citations omitted);  
2 *Rogers v. Ulrich*, 52 Cal. App. 3d 894, 899 (1975). By contrast, a party to a communication can  
3 record it (and is not eavesdropping when it does). *Id.* at 897- 99; *In re Facebook, Inc. Internet*  
4 *Tracking Litig.*, 956 F.3d 589, 607 (9th Cir. 2020), *cert. denied*, No. 20-727, — U.S. —, 141  
5 S.Ct. 1684 (U.S. Mar. 22, 2021).

6 Allstate, as the website owner, was the intended recipient of Plaintiff’s alleged  
7 communications and could not have “eavesdropped” as a matter of law. *Williams*, 2022 WL  
8 17869275, at \*2 (website owner cannot be liable under first three clauses of Section 631(a)); *Licea*  
9 *v. Am. Eagle Outfitters*, --- F.Supp.3d ----, 2023 WL 2469630, at \*7 (Mar. 7, 2023) (same)  
10 (hereinafter “*Am. Eagle*”); *Licea v. Cinmar, LLC*, No. 22-6454-MWF, 2023 WL 2415592, at \*7  
11 (C.D. Cal. Mar. 7, 2023) (hereinafter “*Cinmar*”). Plaintiff’s claims for violation of Section 631(a)  
12 against Allstate therefore fail as a matter of law.

13 Heap, an extension of Allstate, is also a party-participant to the alleged communications.  
14 *Graham v. Noom, Inc.*, 533 F. Supp. 3d 823 (N.D. Cal. 2021) is instructive. Plaintiffs in *Graham*  
15 visited the Noom website to search for diet offerings. *Graham*, 533 F. Supp. 3d at 828. Noom used  
16 the program of a third-party vendor designed “to capture and analyze data so that [Noom] can see  
17 how visitors are using [its] websites.” *Id.* Noom “put [the vendor’s] code on [its] website[] to  
18 capture the data, and then ... review the data, which [was] stored in the cloud on [the vendor’s]  
19 servers.” *Id.* Plaintiffs claimed defendants “record[ed] visitor data such as keystrokes, mouse  
20 clicks, and page scrolling[,]” and through “Session Replay” function were able to “playback” any  
21 user’s interactions on website. *Id.* The *Graham* plaintiffs claimed this conduct violated CIPA  
22 Section 631. *Id.*

23 The court dismissed the claims holding “as a service provider, [the vendor] is an extension  
24 of Noom. It provides a tool – like the tape recorder in *Rogers* – that allows Noom to record and  
25 analyze its own data in aid of Noom’s business. It is not a third-party eavesdropper.” *Id.* at 833  
26 (citations omitted); *Williams*, 2022 WL 17869275, at \*4 (holding the third-party vendor  
27 “functioned as a recorder, not an eavesdropper”); *see also Cinmar*, 2023 WL 2416692, at \*7-\*9  
28 (concluding software used to record website chats is akin to a recording device and does not

1 violate Section 631(a)); *Johnson v. Blue Nile*, 2021 WL 1312771, at \*2 (N.D. Cal. Apr. 8, 2021)  
2 (same); *Am. Eagle*, 2023 WL 2469630, at \*8 (same); *Byars v. Hot Topic*, No. 22-1652-JGB, 2023  
3 WL 2026994, at \*10 (C.D. Cal. Feb. 14, 2023) (same). Same is true here.

4 Plaintiff alleges Heap “is a marketing analytic software-as-a-service (“SaaS”) company  
5 that sells an analytics platform software product that records consumer interactions with a website  
6 in real time. Website owners can use this software by adding Heap’s JavaScript into the source  
7 code of their website. This allows both Heap and the website owner to record a visitor’s  
8 keystrokes and other actions on the website.” Compl. at ¶ 2. Plaintiff asserts “Allstate uses Heap’s  
9 JavaScript on Allstate.com, which is embedded in the source code of Allstate’s website.” *Id.* at ¶  
10 30. Plaintiff asserts Heap provides the collected information to its clients, *i.e.*, Allstate. *Id.* at ¶ 24.  
11 Plaintiff does not allege Heap did anything with the data allegedly collected from his interactions  
12 with Allstate’s website other than make it available to Allstate—the party with which Plaintiff  
13 intended to communicate. Plaintiff does not allege Heap sold his data, used it for advertising or  
14 any other purposes, or disclosed it to any third party.

15 These allegations do not amount to a surreptitious wiretapping by a third party. Heap is an  
16 “extension” of Allstate, not a third-party, and cannot be held liable under first three clauses of  
17 Section 631(a). *See Graham*, 533 F. Supp. 3d at 832; *Johnson*, 2021 WL 1312771, at \*2 (“[F]or  
18 the reasons stated in *Graham v. Noom*, FullStory is not a third-party eavesdropper.”); *Cinmar*,  
19 2023 WL 2415592, at \*9 (“Plaintiffs’ allegations suggest a situation more akin to *Graham*, where  
20 the court found that a third party was not an eavesdropper where their software collected clients’  
21 data, kept the data on its servers, and allowed clients to analyze their data.”).

22 **3. Plaintiff’s Section 631(a)(ii) and (a)(iv) Claims Fail as the Information at**  
23 **Issue Is Not “Content” Under the Statute**

24 Section 631(a) prohibits the unauthorized access of the *contents* of any communications.  
25 Cal. Penal Code § 631(a); *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 127 (N.D. Cal. 2020). The  
26 “contents” of a communication under CIPA and the federal Wiretap Act are the same. *Brodsky*,  
27 445 F. Supp. 3d at 127 (citation omitted). The “content” of a communication is “the intended  
28 message conveyed by the communication.” *In re Zynga Priv. Litig.*, 750 F.3d 1098, 1106 (9th Cir.

2014). It does not include “record information regarding the characteristics of the message that is generated in the course of the communication” such as “the name, address and subscriber number or identity of a subscriber or customer.” *Id.* (cleaned up). Similarly, the origin, length, and time of a call, or geolocation data are not content. *United States v. Reed*, 575 F.3d 900, 914–17 (9th Cir. 2009); *S.D. v. Hytto Ltd.*, 2019 WL 8333519, at \*6 (N.D. Cal. May 15, 2019).

Plaintiff bases his claim at least in part on Heap’s purported capture of data that are not “contents” under CIPA. Plaintiff asserts “[d]uring Plaintiff’s visit, Heap’s ‘Session Replay’ feature created a video capturing Plaintiff’s *keystrokes and mouse clicks on the website*. It also captured *the date and time of each visit, the duration of the visit, Plaintiff’s IP address, his location at the time of the visit, browser type, and the operating system on their device*.” Compl. ¶ 50 (emphasis added). The keystrokes and mouse clicks, including the date and time of each visit, the duration of the visit, IP address, geolocation, browser type and operating system are not content for purposes of the statute. *Yoon v. Lululemon USA Inc.*, 549 F. Supp. 3d 1073, 1082–83 (C.D. Cal. 2021) (“keystrokes, mouse clicks, pages viewed, and shipping and billing information ... [and] the date and time of the visit, the duration of the visit, Plaintiff’s IP address, her location at the time of the visit, her browser type, and the operating system on her device” are not content for purposes of the CIPA statute); *McCoy v. Alphabet, Inc.*, 2021 WL 405816, at \*14 (N.D. Cal. Feb. 2, 2021) (“data on when and how often an Android Smartphone user opens and runs non-Google apps and the amount of time spent on the apps” is not content); *In re Nickelodeon Consumer Priv. Litig.*, 2014 WL 3012873, at \*15 (D.N.J. July 2, 2014) (“IP addresses and URLs” are not content). The Court should dismiss Plaintiff’s CIPA claims to the extent Plaintiff attempts to base his claims on the purported collection of information that is not “content” for purposes of CIPA.

#### **4. Heap Cannot Violate Section 631(a)(iv)**

Section 631(a)(iv) provides liability for any person “who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the” other three bases for liability. Plaintiff asserts Heap “aided, agreed with, employed, and conspired with Heap to implement Heap’s technology, and to accomplish the wrongful conduct at issue.” (*Id.* ¶ 76(c)). Plaintiff cannot aid and abet itself in violating Section 631(a)(i)-(iii). Nor can Heap violate

1 the fourth clause of Section 631(a) because it cannot aid and abet a participant to a communication,  
2 *i.e.*, Allstate, to “eavesdrop” to its own communication. To the extent Plaintiff’s claims are based  
3 on the alleged aiding and abetting theory, these claims fail.

4 **B. PLAINTIFF’S INVASION OF PRIVACY CLAIM FAILS**

5 “To establish a valid claim under the California Constitution’s right to privacy, a plaintiff  
6 must first demonstrate three elements: (1) a legally protected privacy interest; (2) a reasonable  
7 expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to  
8 a serious invasion of the protected privacy interest.” *Armstrong v. Allied Ins. Co.*, No. EDCV-14-  
9 0424, 2014 WL 12591844, at \*5 (C.D. Cal. Aug. 19, 2014). It is well settled that to get past the  
10 pleading stage on a motion to dismiss for such a claim, a plaintiff must pass a “high bar.” *Low v.*  
11 *LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012); *see also Pioneer Elecs. (USA), Inc.*  
12 *v. Superior Court*, 40 Cal. 4th 360, 370, 150 P.3d 198 (2007)).

13 **1. Plaintiff’s Invasion of Privacy Claim Should Be Dismissed Because He**  
14 **Fails to Allege a Legally Protected Privacy Interest as the Information at**  
**Issue is Not Sensitive and Confidential**

15 A constitutionally protected informational privacy interest is limited to “*sensitive* and  
16 *confidential* information,” *In re Yahoo*, 7 F. Supp. 3d at 1041, such as “symptoms, family history,  
17 diagnoses, test results and other intimate details concerning treatment,” *Grafilo v. Wolfsohn*, 33  
18 Cal. App. 5th 1024, 1034 (2019) (quoting *Lewis v. Superior Court*, 3 Cal. 5th 561, 575 (2017)).  
19 Here, Plaintiff alleges he “used Allstate website to search for an insurance quote, entering his  
20 private information into the online form at Allstate.com.” Comp. ¶ 6. Plaintiff asserts during his  
21 visit, “Allstate and Heap recorded Plaintiff’s electronic communications in real time, and used the  
22 intercepted data to learn his identity, email address, zip code, date of birth, height, weight, use of  
23 prescription medications and tobacco products, and other PII and PHI without his consent.” *Id.*  
24 Plaintiff asserts “[d]uring Plaintiff’s visit, Heap’s ‘Session Replay’ feature created a video  
25 capturing Plaintiff’s *keystrokes and mouse clicks on the website*. It also captured *the date and time*  
26 *of each visit, the duration of the visit, Plaintiff’s IP address, his location at the time of the visit,*  
27 *browser type, and the operating system on their device.*” *Id.* at ¶ 50 (emphasis added).

28 Plaintiff does not allege the kinds of data he provided to Allstate and/or Heap. His

1 conclusory allegation that he provided private information which Heap “used to learn his identity,  
2 email address, zip code, date of birth, height, weight, use of prescription medications and tobacco  
3 products” is insufficient. Plaintiff does not allege Heap received his medical history, profile, or  
4 information about his treatment. Plaintiff cannot claim he has a legally protected interest in the  
5 information gathered because the allegations show the information is not sensitive or confidential.

6 **2. Plaintiff’s Invasion of Privacy Claim Fails Because the Alleged Invasion**  
7 **Is Not Sufficiently Serious**

8 “Actionable invasions of privacy must be sufficiently serious in their nature, scope, and  
9 actual or potential impact to constitute an egregious breach of the social norms underlying the  
10 privacy right.” *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012)  
11 (quoting *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 26, 37 (1994)). Thus, the alleged  
12 breach must not be slight or trivial in nature. *Hill*, 7 Cal. 4th at 37. “Even disclosure of personal  
13 information, including social security numbers, does not constitute an egregious breach of the  
14 social norms to establish an invasion of privacy claims.” *Low v. LinkedIn Corp.*, 900 F. Supp. 2d  
15 1010, 1025 (N.D. Cal. July 12, 2021) (citations omitted); see *In re iPhone Application Litig.*, 844  
16 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012) (“Here, the information allegedly disclosed to third  
17 parties included the unique device identifier number, personal data, and geolocation information  
18 from Plaintiffs’ iDevices. Even assuming this information was transmitted without Plaintiffs’  
19 knowledge and consent, a fact disputed . . . such disclosure does not constitute an egregious  
20 breach of social norms.”); *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1127–28 (N.D. Cal. 2008)  
21 aff’d, 380 Fed. App’x. 689 (9th Cir. 2010) (holding that the theft of a retail store’s laptop  
22 containing personal information, including the social security numbers, of job applicants did not  
23 constitute an egregious breach of privacy and therefore was not sufficient to state a valid claim  
24 under the California Constitutional right to privacy); *Mastel v. Miniclip SA*, 549 F. Supp. 3d 1129,  
25 1142 (E.D. Cal. July 14, 2021) (dismissing claim for invasion of privacy under the California  
26 Constitution because allegations that defendant may have access to personal contact information  
27 and the like “simply do not approach the sort of ‘egregious’ or ‘highly offensive’ conduct which  
28 courts have typically permitted to proceed beyond the motion to dismiss stage”).

1 Plaintiff alleges “Allstate owns and operates Allstate.com.” Compl. ¶ 17. Heap “is a  
2 marketing analytic software-as-a-service (“SaaS”) company that sells an analytics platform  
3 software product that records consumer interactions with a website in real time. Website owners  
4 can use this software by adding Heap’s JavaScript into the source code of their website. This  
5 allows both Heap and the website owner to record a visitor’s keystrokes and other actions on the  
6 website.” *Id.* at ¶ 2. Plaintiff asserts “Allstate uses Heap’s JavaScript on Allstate.com, which is  
7 embedded in the source code of Allstate’s website.” *Id.* at ¶ 30. Plaintiff alleges “[d]uring  
8 Plaintiff’s visit, Heap’s ‘Session Replay’ feature created a video capturing Plaintiff’s *keystrokes*  
9 *and mouse clicks on the website*. It also captured *the date and time of each visit, the duration of*  
10 *the visit, Plaintiff’s IP address, his location at the time of the visit, browser type, and the operating*  
11 *system on their device.*” *Id.* at ¶ 50 (emphasis added). The collection of this information (assuming  
12 this information is private), does not amount to an egregious breach of privacy. *See, e.g.,*  
13 *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 993 (Cal. Ct. App. 2011) (“[W]e have  
14 found no case which imposes liability based on the defendant obtaining unwanted access to the  
15 plaintiff’s private information which did not also allege that the use of plaintiff’s information was  
16 highly offensive.”); *Mitchell v. Regional Serv. Corp.*, No. C 13-042212-JSW, 2014 WL 12607809,  
17 at \*5 (N.D. Cal. Apr. 23, 2014) (holding that trespassing onto plaintiff’s property and observing  
18 personal activities of plaintiff did not amount to a serious invasion of privacy because defendant  
19 had legitimate business and legal reason for doing so); *Phillips v. Archstone Simi Valley LLC*, No.  
20 15- cv-5559, 2016 WL 400100, at \*9 (C.D. Cal. Feb. 1, 2016) (dismissing invasion of privacy  
21 claim because plaintiff failed to allege how purported intrusions were egregious and serious in  
22 nature). Plaintiff’s invasion of privacy claim thus fails.

23 **3. Plaintiff’s Invasion of Privacy Claim Fails as Heap’s Business or the**  
24 **Alleged Conduct Are Not Highly Offensive**

25 Plaintiff does not plead facts showing a “highly offensive” invasion of privacy. Plaintiff’s  
26 conclusory allegation that “[a] reasonable person would find it highly offensive that Defendants  
27 received, collected, and stored Plaintiff’s and class members’ private personal information without  
28 their consent[.]” is insufficient to state a claim for invasion of privacy. As Plaintiff acknowledges,

1 Heap simply provides a commonplace internet analytics tool to Allstate for it to capture the  
2 actions taken by users interacting with its own website. Compl. ¶¶ 2, 30. Like security cameras  
3 and voice recorders, this tool helps Allstate improve its website’s users’ experience. This is a  
4 routine commercial practice not amounting to a “highly offensive” conduct. *See McCoy v.*  
5 *Alphabet, Inc.*, No. 20-cv-05427-SVK, 2021 WL 405816, at \*7 (N.D. Cal. Feb. 2, 2021) (noting  
6 that “courts have characterized the collection and disclosure of [personal information about the  
7 users of a technology] as ‘routine commercial behavior’”) (citation omitted); *In re Google, Inc.*  
8 *Privacy Policy Litig.*, 58 F. Supp. 3d 968, 988 (N.D. Cal. 2014) (“courts in this district have  
9 consistently refused to characterize the disclosure of common, basic digital information to third  
10 parties as serious or egregious violations of social norms”); *Low v. LinkedIn Corp.*, 900 F. Supp.  
11 2d 1010, 1025 (N.D. Cal. 2012) (disclosure of digital identification information such as users’  
12 browsing histories “does not meet the standard set by California courts” to establish a common  
13 law claim for invasion of privacy); *Folgelstrom v. Lamp Plus, Inc.*, 195 Cal.App.4th 986, 992  
14 (2011) (defendant’s collection of the plaintiff’s address without his knowledge or permission, and  
15 use of it to mail him coupons and other advertisements, not an egregious breach of social norms,  
16 but rather “routine commercial behavior.”).

17 Plaintiff’s constitutional invasion of privacy claims thus fail as a matter of law.

18 **C. PLAINTIFF’S CALIFORNIA UNFAIR COMPETITION LAW CLAIMS FAIL**

19 **1. Plaintiff Lacks Standing to Bring UCL Claims as He Failed to Alleged**  
20 **Any Economic Injury**

21 To establish a defendant violated Unfair Competition Law (“UCL”), a plaintiff must first  
22 demonstrate UCL standing, which is distinct from Article III standing. *Mastel*, 549 F. Supp. 3d at  
23 1144. To establish UCL standing, a plaintiff must show more than an injury in fact: he “must  
24 establish that [he] (1) suffered an injury in fact and (2) lost money or property as a result of the  
25 unfair competition.” *Id.* (citing *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009))  
26 (emphasis added); *see also* Cal. Bus. & Prof. Code § 17204. Plaintiff does not allege that his  
27 personal information has economic value or that he has suffered any economic injury as a result of  
28 Heap’s conduct. *See Mastel*, 549 F. Supp. 3d at 1144 (“Numerous courts have held that disclosure

1 of personal information alone does not constitute economic or property loss sufficient to establish  
2 UCL standing, unless the plaintiff provides specific allegations regarding the value of the  
3 information.”). Because Plaintiff has failed to plead any allegations concerning the economic  
4 value of the personal information allegedly obtained by Heap, the court should dismiss Plaintiff’s  
5 claim for violations of the UCL.

6 **2. Plaintiff Fails to Plead Claims Under UCL Because the Underlying**  
7 **Theories of Liability Fail**

8 Plaintiff’s claim under the “unlawful” and “unfair” prongs of the UCL fail because they are  
9 predicated on the same theories underlying his invasion of privacy claims, making the failure of  
10 those underlying theories fatal. *See* Compl. ¶¶ 85-86; *Mai v. Supercell Oy*, --- F.Supp.3d ----, No.  
11 20-cv-05573, 2023 WL 25713, at \*6 (N.D. Cal. Jan. 3, 2023) (dismissing “unfair” UCL claim  
12 based on same conduct as “unlawful” UCL claim where “unlawful” UCL claim was dismissed);  
13 *see also Kellman v. Spokeo, Inc.*, 599 F. Supp. 3d 877, 896 & n.5 (N.D. Cal. 2022); *Romoff v.*  
14 *Gen. Motors LLC*, 574 F.Supp.3d 782, 789-90 (S.D. Cal. 2021) (dismissing “unfair” UCL claim  
15 based on same conduct as “unlawful” and “fraudulent” UCL claims, when “unlawful” and  
16 “fraudulent” UCL claims were dismissed); *Hadley v. Kellogg Sales Co.*, 243 F.Supp.3d 1074,  
17 1104-05 (N.D. Cal. 2017) (same); *Eidmann v. Walgreen Co.*, 522 F.Supp.3d 634, 647 (N.D. Cal.  
18 2021) (same). UCL provides an independent cause of action but requires an underlying  
19 violation because “[S]ection 17200 borrows violations of other laws and treats them as unlawful  
20 practices.” *See Davis v. HSBC Bank*, 691 F.3d 1152, 1168 (9th Cir. 2012) (alteration in original)  
21 (quoting *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548,  
22 973 P.2d 527, 539-40 (Cal. 1999)).

23 Plaintiff alleges Heap’s unlawful conduct is based on violations of CIPA, Cal. Penal Code  
24 § 631, and violations of Plaintiff’s privacy rights under the California Constitution. Compl. ¶ 85.  
25 As explained above, those claims fail as a matter of law. *See* Sections A and B *supra*. Because  
26 Plaintiff has not alleged any valid underlying violation of law, Plaintiff has not alleged a violation  
27 of the UCL’s “unlawful” prong. *See, e.g., Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal.App.4th  
28 700, 718 (2001) (no “unlawful” UCL claim where plaintiff did not state an underlying violation of

any statute or law); *In re Google, Inc. Privacy Policy Litig.*, 58 F.Supp.3d at 984-85 (“derivative UCL [unlawful] claim” fails where plaintiff did not allege underlying violation of law).

**3. Plaintiff Fails to Plead Claims Under Unfair Prong of UCL**

To determine whether conduct is “unfair” for purposes of the UCL, courts apply one of two tests: the balancing test, *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th (1999), or the tethering test, *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163 (1999). Plaintiff’s claim does not satisfy either one of these tests.

*Balancing Test.* Under the balancing test, “an ‘unfair’ business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *S. Bay Chevrolet*, 72 Cal. App. 4th at 886-87 (quoting *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984)). In applying this test, the Court must weigh the practice’s “impact on its alleged victim, balanced against the reasons, justifications[,] and motives of the alleged wrongdoer.” *S. Bay Chevrolet*, 72 Cal. App. 4th at 886 (quoting *State Farm Fire & Cas. Co. v. Super. Ct.*, 45 Cal. App. 4th 1093, 1103-04 (1996), *abrogated by Cel-Tech*, 20 Cal. 4th 163.). “In brief, the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” *Id.* (quoting *State Farm Fire & Cas. Co.*, 45 Cal. App. 4th at 1104).

*Tethering Test.* Pursuant to the tethering test, “unfairness . . . under section 17200 [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.” *Cel-Tech Commc’ns, Inc.*, 20 Cal. 4th at 186-87.

Plaintiff alleges in conclusory fashion that “Defendants acted in an immoral, unethical, oppressive, and unscrupulous manner by knowingly wiretapping Plaintiff’s and class member’s communications of their private personal information without their consent.” Comp. ¶ 87. As explained above, Plaintiff’s CIPA claims fail. Moreover, there is nothing immoral, unethical, oppressive, and unscrupulous about providing Allstate with a software to create better digital experiences for its customers. There are no allegations that Heap discloses, uses, or duplicates the gathered information for any improper purpose. Heap’s software is used for legitimate business purposes and is not an unfair practice under either the balancing test or the tethering test.

1 **VI. CONCLUSION**

2 Plaintiff's Complaint should be dismissed in its entirety.

3 DATED: May 31, 2023

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